(1) Supreme Court, U.S.
FILED

97 1752 APR 27 1998

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MISSOURIANS FOR TAX JUSTICE EDUCATION PROJECT, INC., a corporation; MISSOURI ASSOCIATION FOR SOCIAL WELFARE, a corporation; LARRY C. GAINES; and LAVONNE J. SHINN,

Petitioners,

v.

BOB HOLDEN, State Treasurer; MEL CARNAHAN, Governor; JANETTE M. LOHMAN, Director, Department of Revenue; RICHARD A. HANSON, Commissioner of Administration; and STATE OF MISSOURI,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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April, 1998

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

57pp

QUESTIONS PRESENTED

Article X, §18(a) of the Missouri constitution establishes a limit on the total state revenues which the state may receive from many sources, and spend in each fiscal year, in order "to rein in increases in governmental revenue and expenditures." Section 18(b) requires that excess revenues be "refunded pro rata based on the Missouri state income tax . . . annual returns" filed after the fiscal year. Total state revenues for fiscal year 1995 exceeded the limit, triggering this "refund" requirement. Petitioners, who paid no income tax but paid sales taxes and other taxes, challenged this "refund" requirement as a violation of the Equal Protection Clause of the Fourteenth Amendment. The Questions Presented are:

1. Did the supreme court of Missouri in fact apply the Equal Protection standard of review, established by this Court, when it simply determined that the constitutional requirement to distribute the excess revenue to income taxpayers is rationally related to the state's purpose, without considering whether the distinction made by §18(b) between income taxpayers and all other persons furthers the stated purpose?

2. By limiting the "refunds" to income taxpayers, does §18(b) further the state's purpose "to rein in increases in governmental revenue and expenditures," and thereby satisfy the requirement of the Equal Protection Clause?

LIST OF PARTIES

All parties are listed on the cover. All petitioners were plaintiffs and appellants below. All respondents were defendants and respondents below.

RULE 29.6 LIST

There are no parent companies or nonwholly owned subsidiaries of either corporate petitioner.

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Missourians for Tax Justice Education Project, Inc., Missouri Association for Social Welfare, Larry C. Gaines, and Lavonne J. Shinn respectfully petition for a writ of certiorari to review the judgment of the supreme court of Missouri in this case.

OPINIONS BELOW

The opinion of the supreme court of Missouri (App., *infra*, A-1) is reported at 959 S.W.2d 100. The opinion of the circuit court for Cole County (App., *infra*, A-16) is not reported.

JURISDICTION

The supreme court of Missouri entered its judgment on December 23, 1997 (p. A-1, *infra*). The supreme court denied a timely motion for rehearing on January 27, 1998 (p. A-15, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

Section 18(a) of Article X of the Missouri constitution establishes a revenue limit for the state government. That section is set forth in the opinion of the Missouri supreme court at p. A-3, *infra*. Section 18(b) provides:

> For any fiscal year in the event that total state revenues exceed the revenue limit established in this section by one percent or more, the excess revenues shall be refunded pro rata based on the liability reported on the Missouri state income tax (or its successor tax or taxes) annual returns filed following the close of such fiscal year. If the excess is less than one percent, this excess shall be transferred to the general revenue fund.

STATEMENT OF THE CASE

Petitioners, two not-for-profit corporations and two individuals, are residents of Missouri who paid state sales taxes and other

state taxes during fiscal year (FY) 1995,[1] but did not pay any Missouri income tax or report any Missouri income tax liability on returns filed during FY 1996. They sued the state and its responsible officials, alleging that the state's plan to distribute "excess revenues" collected in FY 1995 only to those who filed income tax returns in FY 1996, on the basis of the income tax liability reported, excluding from participation in the distribution those persons who pay sales taxes and other taxes and fees, violates the Equal Protection Clause of the Fourteenth Amendment. Petitioners sought declaratory and injunctive relief. The circuit court denied relief, and the supreme court of Missouri affirmed.

1. The "refund" provision of Missouri's constitution

In 1980, following the lead of California and Michigan, interested citizens in Missouri submitted to the voters a constitutional amendment, by the initiative. In November, 1980, the voters approved that amendment. It appears in the Missouri constitution as Article X, §§ 16-24. It is popularly called the "Hancock Amendment."

The Missouri supreme court has consistently stated that the central purpose of the Hancock Amendment is to "rein in increases in governmental revenues and expenditures." See page A-2, *infra*. While the amendment deals in part with revenues of cities and counties, and with the financial relationship between the state and its political subdivisions, the principal feature of the amendment is the establishment of a state revenue limit. The revenue limit is defined by a complicated formula, set forth in §18(a), quoted at page A-3, *infra*. The wording of that revenue limit has been much criticized, but is here assumed to be adequately definite and valid. The limit is imposed upon "total

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[1] Missouri's budgets and accounts are based on fiscal years, not calendar years. FY 1995 ended on June 30, 1995.

state revenues," which include revenues from many sources. The proportions contributed by each revenue source change from year to year. The parties stipulated that in FY 1995 income taxes accounted for somewhat more than half of total state revenues, although subsequent review of precise numbers indicates that income taxes contributed approximately 43% of total state revenues in that year. Sales taxes are the second largest source of total state revenues.

To implement the revenue limit, § 18(b) of the Hancock Amendment requires that the excess revenues be refunded pro rata based on the liability reported on the Missouri state income tax annual returns filed following the close of the fiscal year. However, if the excess revenues are less than 1% of total state revenue, the excess is to be transferred to the general revenue fund.

Immediately after its enactment this provision was challenged as a violation of the Equal Protection Clause of the Fourteenth Amendment, in excluding sales taxpayers and others from participation in the distribution of the excess revenues to which they all have contributed. In the early life of this amendment two judges of the Missouri supreme court expressed the opinion that the refund provision denied equal protection of the laws, but on each occasion a majority of the court declined to consider the question on the ground that it was not ripe for review because the state revenue limit had not been exceeded. *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 16-17 (Mo. banc 1981); *Buechner v. Bond*, 650 S.W.2d 611, 615-16 (Mo. banc 1983). Until the revenue limit was in fact exceeded in FY 1995, as determined by the state in 1996, there was no appropriate occasion for judicial review of the validity of the refund provision.

In the summer of 1996 the defendants announced their plans to distribute the FY 1995 excess revenue by mailing "refund" checks in the fall to income taxpayers, pursuant to the mandate

of this refund provision. In August, 1996, petitioners filed this suit seeking a declaratory judgment that the refund provision of §18(b) is unconstitutional, and an injunction against distributing the FY 1995 excess revenue in accordance with this provision.

2. Proceedings below

The petition was filed and a temporary restraining order was issued on August 23, 1996. The petition named as defendants not only the state, but also the Treasurer, whose duty it would be to sign the checks, and the three other officials who play a role in determining the amount of excess revenue to be "refunded" to each person, namely, the Governor, the Director of the Department of Revenue, and the Commissioner of Administration.

The case was tried on September 25, 1996. Most of the facts were stipulated. For FY 1995 the "total state revenue" exceeded the revenue limit by approximately $147 million. The defendants were carrying out their preparations to pay the excess revenues to Missouri income taxpayers pursuant to the mandate of Article X, §18(b). In order to accomplish this, they were dividing each income taxpayer's paid income tax liability for annual returns filed during FY 1996 into the total amount of paid income tax liability for annual returns filed during that fiscal year, thus deriving a percentage or ratio, and applying that ratio to the total amount of "excess revenue" for FY 1995, to determine the amount to be distributed to each income taxpayer.

The "total state revenue" for FY 1995 included revenue from many sources. Income taxes paid in FY 1995 (not those paid for calendar year 1995 in April 1996) accounted for somewhat more than half of that total.[2] The second largest source of revenue was sales tax. Tr. 46. Other significant sources of revenue included

[2] Subsequent calculations based on precise accounts led to the conclusion that income taxes accounted for approximately 43% of the total. See p. A-27, *infra*.

motor fuel taxes and use taxes. It was stipulated that, pursuant to the constitution's "refund" provision, persons who paid sales, use, motor fuel, cigarette or other state taxes or fees during FY 1995, but did not file Missouri income tax returns during FY 1996 showing income tax liability, would not receive any of the "excess revenue" that was to be distributed.

At trial the evidence showed that the third largest source of revenue, the insurance premium tax, is derived from individual policy holders, who are readily identifiable. Tr. 46. The next largest category of revenues is corporate franchise taxes, paid by corporations readily identifiable. Tr. 47. The next is the estate tax, and those taxpayers are readily identifiable. Tr. 47. Many of the other revenues are paid by persons who are readily identifiable. Tr. 47. The defendants presented an expert witness who prepared and explained defendant's Exhibit A, page A-29, *infra*. He conceded that sales taxes paid by individuals can be estimated with a reasonable degree of accuracy, on the basis of their gross income. Tr. 74. A person who is, by income, in the lowest one-tenth of Missouri residents would pay $489 in state and local sales tax, but would pay no state income tax. Tr. 74. Fifty-five percent of the people pay more in state and local sales taxes than they pay in state income taxes. Page A-29, *infra*. More than 20 % contribute more to total state revenue by way of state sales tax than by way of state income tax.

After the trial the parties filed briefs, and proposed findings and conclusions. On January 6, 1997, the circuit court entered its judgment, holding that there was no denial of Equal Protection. Subsequently the circuit court stayed the mailing of checks pending the appeal.

On appeal, the Equal Protection argument was pursued by petitioners. On December 23, 1997, the Missouri supreme court affirmed, holding that there was no denial of Equal Protection. The court first reviewed Equal Protection jurisprudence in

general, and acknowledged that the issue is whether the classification established by the state law in question is rationally related to a legitimate state interest. The court then undertook to apply the law to the facts of this case. The court abandoned any consideration of the classification established by §18(b), favoring income taxpayers and disfavoring all others. The court held that the overall effect of §18(b) is rationally related to the purpose "to rein in increases in governmental revenue and expenditures." Page A-8, *infra*.

Petitioners filed a timely petition for rehearing on January 6, 1998. Rehearing was denied on January 27, 1998 (page A-15, *infra*). Petitioners learned of that denial on Thursday, January 29. On that same day they dispatched to the supreme court by overnight mail a motion to stay the mailing of checks pending certiorari proceedings. On Friday, January 30, the supreme court Clerk notified counsel by telephone that the mandate had issued on January 29, and there was no case pending before the court in which to file a motion for stay. The Clerk returned all copies of the motion by mail on February 2 (p. A-26, *infra*).

On Friday, January 30, petitioners transmitted to the circuit court a motion for stay pending certiorari proceedings (p. A-27, *infra*). Petitioners were not able to obtain a hearing on that motion for stay until February 9, 1998, at which time the circuit judge denied the motion, stating, "I have no jurisdiction."

3. The Equal Protection claim was timely raised and preserved

In paragraph 16A of the original petition filed in the circuit court petitioners claimed that "§18(b) . . . discriminates against the poor . . . in violation of the equal protection clauses of the Fourteenth Amendment of the United States Constitution . . ." The prayer sought a declaratory judgment that the "refund mandate of Article X, §18(b) of the Missouri Constitution is

unconstitutional, in violation of the Fourteenth Amendment," and sought an injunction against "implementing the mandate of Article X, §18(b)." The first amended petition, on which the case was tried, set forth the same allegation and prayer.

Petitioners' trial brief argued that §18(b) violates "the equal protection clause," citing *Zobel v. Williams*, 457 U.S. 55, 60 (1982); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985); and other Equal Protection cases. The proposed Conclusions of Law submitted by petitioners to the circuit court included the conclusion that §18(b) "deprives the plaintiffs of . . . the equal protection of the laws, in violation of the Fourteenth Amendment," citing *Zobel v. Williams*, *supra* and other Equal Protection cases. The judgment proposed by plaintiffs in the circuit court included a "declaratory judgment that: A. The refund mandate of Article X, §18(b) . . . is unconstitutional in violation of the Fourteenth Amendment." Plaintiffs' reply brief filed in the circuit court argued extensively that §18(b) "is an unconstitutional violation of the Equal Protection Clause," citing *Zobel v. Williams*, *supra*, and other Equal Protection cases.

The circuit court opinion acknowledged that "Plaintiffs contend that the refund mechanism violates the Equal Protection Clause of the U.S. Constitution . . .," and rejected petitioners' "equal protection challenge of the Hancock Amendment's enforcement mechanism, the refund provision of Section 18(b)..." Pages A-20, A-21, *infra*.

On appeal, the Equal Protection claim was the first Point Relied On set forth in petitioners' brief:

> The circuit court erred in entering judgment for the defendants, refusing to issue the declaratory and injunctive relief requested, because the refund mechanism provided in Article X, Section 18(b): A. Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States constitution . . . ,

citing *Zobel, Hooper,* and other Equal Protection cases. The first point of the argument quoted the Equal Protection standard from *Zobel*: "A law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose." *Zobel v. Williams*, 457 U.S. at 60. The same point was argued extensively in the reply brief, where petitioners pointed out that the attorney general, in his brief, did "not even contend that the distinction made by §18(b) between income taxpayers and the other taxpayers who contributed to the 'excess revenue' furthers any state purpose whatever."

In its opinion the supreme court acknowledged that petitioners "insist that this refund provision violates constitutional guarantees of equal protection . . ." Page A-2, *infra*. The court rejected that contention.

In their motion for rehearing before the supreme court petitioners again argued:

> The test to determine whether the refund mechanism of Article X, §18(b) violates the Equal Protection Clause is whether "the distinction it makes rationally furthers a legitimate state purpose." *Zobel v. Williams*, 457 U.S. 55, 60 (1982). This Court misinterpreted the law when it stated that the test is whether "the means chosen to implement the law is rationally related to achieving" the purpose (slip op. p. 7) or whether the refund mechanism "is a rational means of achieving that purpose" (p. 9).

REASONS FOR GRANTING THE PETITION

In refusing to apply the established standard of review to determine whether a legislative distinction denies equal protection of the laws, the decision below conflicts with all modern equal protection jurisprudence, including such cases as *Zobel v. Williams*, 457 U.S. 55 (1982). The decision not only deprives

Missouri's less fortunate citizens of their fair share of the state's "excess revenues," but also deprives all Missourians of a judicial system which endeavors to uphold and enforce the Fourteenth Amendment. The substantive decision is of increasingly widespread importance, because other states are struggling to decide how to dispose of "excess revenues," and these excesses are anticipated to continue in future years.

1. In ruling on this challenge to Missouri's "refund" provision, the Missouri supreme court refused to apply the established test for violation of the Equal Protection Clause

When state law is challenged under the Due Process or Equal Protection Clauses, the same standards of review are applied to a state constitutional provision as to a state statute. *E.g.*, *Quinn v. Millsap*, 491 U.S. 95 (1989). The applicable standards are well established. The state law survives a Due Process challenge if the law bears "a reasonable relation to a proper legislative purpose," and is not arbitrary or discriminatory. *Nebbia v. New York*, 291 U.S. 502, 537 (1934). See *Kelley v. Johnson*, 425 U.S. 238, 247-48 (1976). However, when a state law is challenged under the Equal Protection Clause, the focus is not on the overall effect of the state law, but on the classification established in the state law. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). The state law will survive Equal Protection scrutiny "if the distinction it makes rationally furthers a legitimate state purpose." *Zobel, supra*, 457 U.S. at 60. This standard is applied specifically when

a state distributes benefits unequally.[3] *Zobel, supra*; *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985).

The "refund" provision of Missouri's Hancock Amendment easily survives a Due Process challenge. The purpose of the Hancock Amendment, as stated by Missouri's supreme court (p. A-7-8), is "to rein in increases in governmental revenue and expenditures." This is unquestionably a legitimate state purpose. Any requirement that the state government disgorge its "excess revenue" would clearly be related to that purpose. That purpose is served by a requirement that the state pay out the money to income taxpayers, or to anyone else. To borrow an example from this Court's recent effort to explain the Equal Protection Clause to the Missouri supreme court, that purpose would be served by requiring that the money be paid out to white males, an obviously untenable requirement under the Equal Protection Clause. *Quinn v. Millsap, supra*, 491 U.S. at 106.

It is equally clear that the "refund" provision cannot survive an Equal Protection challenge. The state must disgorge the "excess revenue." Limiting the recipients of the state's bounty to income taxpayers does not further the stated purpose. As noted above, the purpose would be equally well served by distributing the money to white males, or to any non-governmental recipients.

Confronted with this dilemma, the Missouri supreme court upheld the "refund" provision by applying the Due Process

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[3] This Missouri case concerns distribution of excess money derived from many different sources. It does not concern any scheme of taxation. However, during the course of the litigation it has at times been suggested that the Missouri constitutional "refund" provision should be regarded as a tax mechanism. That suggestion would simply lead to the identical standard of review. The universal Equal Protection standard is applied to tax cases. *E.g.*, *Williams v. Vermont*, 472 U.S. 14, 22-23 (1985); *Nordlinger v. Hahn*, 505 U.S. 1, 10, 11 (1992).

standard. In an introductory review of Equal Protection jurisprudence, the court appeared to acknowledge that Equal Protection review focuses on whether the legislative **classification** is rationally related to a legitimate state purpose, not whether the overall effect of the law is rationally related to a legitimate state purpose. Page A-6, *infra*. However, in considering the validity of the "refund" provision, the court ignored the classification established by the "refund" provision, contenting itself with the conclusion that the "refund mechanism employed by §18(b) is rationally related to the Hancock Amendment's purpose." Page A-8, *infra*. The court did not decide, or even suggest, that the purpose to rein in governmental expenditures would be somehow advanced by limiting the recipients of the excess revenues to income taxpayers.

The court went on to offer four reasons to support its conclusion that "the means chosen to implement the law is rationally related to achieving that purpose." Page A-8, *infra*. None of those four reasons supplies the missing Equal Protection analysis, or recants the erroneous statement of the applicable standard.

The first reason demonstrates again that the court is applying the Due Process standard, not the Equal Protection standard. The court simply asserted that "the refund commanded by §18(b) is a penalty imposed on the government for collecting too much revenue," and making the government give up the excess revenue clearly serves the purpose to rein in governmental expenditures. Page A-8, *infra*. As noted above, this application of the Due Process standard to an Equal Protection challenge would render the Equal Protection Clause inapplicable even to a requirement that the excess revenue be paid out to white males. This result, and the reasoning that leads to it, are obviously untenable. *Quinn v. Millsap*, *supra*, 491 U.S. at 106.

The supreme court of Missouri did not advance the analysis by referring to the "refund" provision as a provision to "make the

government give back money to the persons from whom it took the excess revenue" (page A-8, *infra*). Income taxpayers contributed only 43% of the "excess revenue."[4] See page A-27, *infra*. If the excess revenue is to be "given back" to persons from whom it was taken, it would be given back to those who substantially contributed to the excess revenue, including sales taxpayers, as well as income taxpayers.

The second of the "reasons" offered by the court below also appears to be an application of the Due Process standard rather than the Equal Protection standard. The court asserted that paying the excess revenue to income taxpayers alone is rational because an income taxpayer's actual contribution to the excess revenue is readily and accurately ascertainable. Page A-8, *infra*. That is substantially correct, although the payment to the income taxpayer is not proportional to his contribution.[5] The payment appears to satisfy the Due Process standard of review. However, income taxpayers are no different in this respect from many other persons, and the court does not claim that they are. At the trial petitioners brought out that others who contribute to the excess revenues are at least as easily identifiable, accurately, as the income taxpayers, including those who pay insurance premi-

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[4] At trial, on the basis of estimates furnished by the state, the parties stipulated that income taxes paid in FY 1995 accounted for somewhat more than half of the "total state revenue" for that year. Subsequent calculations based upon more accurate information disclosed that income taxes in fact accounted for 43% of the revenue. The difference does not affect the analysis of the applicable law.

[5] Like Rev. Bembower, who testified at the trial, the recipient of the "refund" may have moved to Missouri between July 1 and December 31, 1995, and paid nothing into the total state revenues of FY 1995, but in FY 1996 paid state income tax on money earned in calendar years 1995 and 1996, thereby becoming eligible for the FY 1995 refund. Further, those who paid income taxes to Missouri in FY 1995 contributed only 43% of the total state revenues, and are rewarded greatly in excess of their contribution when they receive almost 100% of the excess revenue.

ums, those who pay corporate franchise taxes, those who pay state estate taxes, and those who pay various professional fees and license fees. Transcript pp. 46-47. And the Missouri supreme court itself conceded that sales tax payments can be estimated with reasonable accuracy. Page A-8, *infra*. The undisputed facts demonstrate that excluding these other contributors to the excess revenue impedes, rather than furthers, any supposed effort to distribute the excess revenues on the basis of the taxpayer's actual contribution. The opinion below made no effort to apply the Equal Protection standard and demonstrate that excluding these other contributors from participation in the distribution of the excess revenues furthers either the goal to deprive the state of the money or any assumed goal to refund to each person his "actual contribution" to the excess revenue.

The third "reason" offered by the court below does not support the court's conclusion. The court below asserted that distribution of the excess revenue on the basis of income tax liability more accurately reflects each person's "actual contribution" to the excess revenue than would a per capita distribution to all state residents, or a distribution based solely on sales tax estimates. Page A-9,*infra*. This "reason" is irrelevant to the stated goal to rein in governmental expenditures. If it is viewed as establishing a new, secondary goal, to distribute the excess revenue on the basis of each person's contribution to the excess, the analysis is again irrelevant. In this record there has been no suggestion that a refund be based solely on sales tax estimates.[6] An obvious alternative, which the court below declined to recognize, is to distribute the excess revenue on the basis of each person's contribution, including not only those who pay income taxes but also those persons who pay sales taxes and other substantial taxes (putting aside de minimis contributions). Limiting the

[6] The suggestion would have substantial merit. A refund based on sales tax estimates would reflect the contribution of the greatest number of taxpayers. See pages 19-20, A-29, *infra*.

beneficiaries of the state's distribution to income taxpayers alone establishes a distribution which is far less precise, on its face, than a more inclusive distribution, and undermines, rather than furthers, this assumed purpose to "refund" on the basis of each person's "actual contribution."

The fourth "reason" set forth in the opinion below adds further obfuscation. It is surely correct that a distribution on the basis of income tax liability facilitates participation by non-residents who earned income in Missouri and paid income tax to Missouri. Page A-9, *infra*. That point is not relevant to the stated purpose to rein in governmental revenue and expenditures. Even if it be assumed that the state purpose is to benefit the non-resident income taxpayer (a highly unrealistic assumption), that purpose is not rationally served by excluding the sales taxpayers and other contributors from their fair share of the excess revenue. Indeed, the payment to the non-resident income taxpayer would more accurately reflect his "actual contribution" to the excess revenue if sales taxpayers and other contributors were allowed to participate in the distribution.

In summary, the holding of the court below is that distribution of the excess revenue on the basis of income tax liability alone is rationally related to achieving the purpose to rein in increases in governmental revenue and expenditures. Of course it is. The same would be true of a distribution to anybody, including white males. The court below was plainly applying the wrong standard to an Equal Protection challenge. The statement of four "reasons" to support that holding in part confirms the fact that the court was applying the wrong standard, and in part merely adds confusion. The essence of the opinion is that the Missouri supreme court was applying the standard for a Due Process challenge, not an Equal Protection challenge.

2. The classification established in Missouri's "refund" provision does not further any identified state purpose

According to the Missouri supreme court (page A-7-8, *infra*), the state purpose which is controlling here is the purpose "to rein in increases in governmental revenue and expenditures." The state's interest in achieving that goal "is not in any way served by" distributing the excess revenues to income taxpayers only, on the basis of income tax liability, excluding from participation those who pay sales taxes and other taxes, but not income taxes. *Zobel v. Williams*, *supra*, 457 U.S. at 62. Neither the Missouri attorney general nor the Missouri supreme court has made any effort, at any time, to present an argument that the goal is served by this exclusion.

No other "legitimate state purpose" has been identified by the court below. If one attempts to extract some subsidiary purpose from the opinion below, any such purpose is also not served by limiting the recipients to income taxpayers, as is shown above.

3. The decision below deprives thousands of Missourians of their fair share of the state's "excess revenue," and of judicial enforcement of the Fourteenth Amendment

There is no dispute that many Missouri residents pay no state income tax, but pay substantial state sales taxes and other state taxes. The expert witness presented by respondents estimated that 10% of Missourians pay no state income tax, but pay from 7.5% to 10.6% of their gross income in state and local sales taxes. Defendants Ex. A, p. A-29, *infra*. Further, those who are slightly more fortunate, and earn just enough to pay a small state income tax, pay many times the amount of that state income tax in state sales taxes. At least 55% of Missourians pay more in state and local sales taxes than in state income taxes. At least 20% pay more into total state revenues in state sales taxes than in state income taxes.

In short, many Missourians are paying substantial amounts into Missouri's "total state revenues," but are completely shut out when the "excess revenues" are distributed. For the fiscal year ending June 30, 1995, the revenue from the state sales and use taxes in Missouri exceeded that from the corporate income taxes by a factor of approximately four. Plaintiffs' Ex. 5, p. 20. However, the corporate income taxpayers are receiving a major share of the "excess revenues," and the sales and use taxpayers are receiving nothing. The revenue collected from sales and use taxes for that year was approximately 60% as great as that from individual income taxes, but the distribution is based upon income tax liability alone. It is beyond question that many Missouri taxpayers are being deprived of their fair share of the state's "excess revenues," by reason of the classification established in the "refund" provision of the Hancock Amendment.

The courts below accept this discrimination. Apparently the poor are considered to be unworthy, benefiting from the welfare payments taken from the rich. The observations of the circuit court are revealing:

> [T]hose in higher income brackets pay a greater amount of sales taxes than those in the lowest brackets -- in addition to paying the income taxes that these plaintiffs have been able to avoid. Furthermore, those Missourians in the lowest income brackets who incur no net income tax liability receive transfer payments and other subsidies such as food stamps and the earned income tax credit which allow them to consume far in excess of their stated gross income. . . .
>
> . . . [E]ven if plaintiffs' characterization were correct, that the refunds are a transfer of benefits from non-income taxpayers to income taxpayers, plaintiffs would be no more entitled to due process than would income taxpayers whose taxes are used to subsidize the poor with food stamps and other transfer payments. The Court notes that those Mis-

> sourians with the lowest levels of gross income have levels of consumption in excess of that income thanks to these very types of transfer payments.

Pages A-18, A-23, *infra*. Nothing in the record shows that any of the plaintiffs, either the two not-for-profit corporations or the two individuals, receive any transfer payments. Nevertheless, the same tone runs through the brief filed by the attorney general in the circuit court:

> Certainly the Missouri income tax system, like the federal system, creates not just one but many "classes" based on income, including the privileged, untaxed class to which the plaintiffs belong . . . [T]hose in the lowest income brackets are actually spending more than their gross income -- income that excludes the earned income tax credit, food stamps, and other transfer payments. The criteria for making those transfer payments are based on wealth and income. The wealthy and the middle class do not qualify. Those whose incomes are so low that they do not have to pay income tax (and thus do not qualify for the Hancock refund) are the principal beneficiaries of these programs. . . . The plaintiffs never explain how the court could accept their rejection of the use of income taxes as the basis for a refund without reaching a holding that would deprive them of their privileged status in terms of tax avoidance and transfer payment eligibility. While recipients of transfer payments do pay sales taxes, unlike income taxpayers they do not pay sales taxes with funds that have already been taxed once. Rather, they make many of their purchases with funds extracted from income tax payers, and which are not subject to the income tax . . .

As this Court has previously pointed out, a societal "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *U.S. Department of Agriculture v.*

Moreno, 413 U.S. 528, 534 (1973). The *Moreno* ruling can be usefully paraphrased here:

> Thus, in practical operation, the [refund provision] excludes from participation in the [distribution] program, not those persons who [have not contributed to the excess revenue] but, rather, *only* those persons who are so [poor that they do not even pay income tax]. Traditional Equal Protection analysis does not require that every classification be drawn with precise "mathematical nicety." *Dandridge v. Williams*, 397 U.S., at 485. But the classification here in issue is not only "imprecise," it is wholly without any rational basis.

413 U.S. at 538. The decision below withdraws from the undeserving poor, those who benefit from their "privileged status in terms of tax avoidance and transfer payment eligibility," the specific legal protection of the Equal Protection Clause. *Cf. Romer v. Evans*, 517 U.S. 620, 633, 634 (1996).

4. The disposition of excess revenues is an ongoing problem in Missouri, and also in other states

Because the Missouri courts refused to stay the distribution of the excess revenues of fiscal years 1995 and 1996 pending certiorari proceedings, those distributions have been made. However, the case presented here is not moot, even in Missouri. Because of the current economic prosperity, the revenue limit was exceeded in FY 1997 by more than twice the 1995 amount of excess, and the state is planning to pursue the same distribution program respecting the excess revenue for that year, mailing the "refund" payments in the fall of 1998. Further, state officials anticipate that the revenue limit will be exceeded again in FY 1998, requiring another distribution of excess revenues in the fall of 1999, and for the next four or five years. The declaratory relief sought by these petitioners still presents a live controversy.

Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 121-22 (1974). The "refund" program challenged here is not only "capable of repetition," but is inevitably being repeated. *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976); *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

The importance of the question presented here is not limited to Missouri. Revenue and/or spending limitations prevail in at least one-fifth of the states. In a majority of those a refund or tax credit is mandatory. In the remainder it is optional. These constraints are embodied in state constitutions, or statutes, or both. Rafool, *State Tax and Expenditure Limits*, Legislative Finance Paper No. 104, National Conference of State Legislatures, Nov. 1996. In at least one state where a tax credit or refund is not required, the legislature has been struggling with proposals to restore excess revenues to taxpayers. It is important that all these states give due respect to the Equal Protection Clause.

Colorado recently adopted a program by statute to restore excess revenues to the people. The Colorado constitution, unlike the Missouri constitution, authorizes the use of any reasonable method for refunding excess revenues. In a special session in the fall of 1997 the Colorado General Assembly adopted a statute providing for refund of the excess revenues for the 1996-97 fiscal year. Section 39-22-120, Colo. Rev. Stat. In calling the special session, the Governor stated: "Since many people have paid something, it is unfair to limit the refund to people who have an income tax liability." Being free to choose a reasonable method, the Colorado General Assembly determined that, because the excess revenues are derived from a wide variety of state taxes and fees, they should "be returned to as large a group of Colorado residents as is identifiable and economically feasible." § 39-22-120.1(i)(I). It was determined that this group is those residents who pay state sales taxes, because "more Coloradans

pay state sales tax than any other state tax." § 39-22-120.1(i)(III). Without attempting to match the refund with any contribution, dollar for dollar, the Colorado General Assembly established refund amounts of $37, $60 and $80 for a single person, doubling each amount for a couple. These amounts were correlated with individuals' federal adjusted gross income for the 1997 tax year. One whose adjusted gross income is less than or equal to $15,000 (and may have neither owed nor paid income tax) receives a tax credit (or refund) of $37, which he can obtain by filing an income tax return demonstrating his qualifications. One whose adjusted gross income is greater than $15,000 but not more than $100,000 receives a credit against income tax of $60. All others receive a credit of $80. In Colorado virtually all who contribute to the excess revenue are permitted to participate in the distribution. The Colorado statute illustrates the point that the distribution easily can -- and should -- be far more equitable and inclusive than Missouri's refund provision permits.

Petitioners are informed that during the 1998 legislative session Connecticut is deliberating proposals to return excess revenues to the people (see *Christian Science Monitor*, March 2, 1998, p. 1), and Colorado is again considering various alternatives for restoring that state's excess revenue to the taxpayers over the next several years.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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